THE SEVENTEENTH CENTURY INDICTMENT IN THE LIGHT OF MODERN CONDITIONS.

NO reform of the criminal procedure will be complete without radical changes in the law relating to indictments. Changes should not be made which would prejudice the *essential* rights of the accused. But if these are preserved the reform can go to any extent that may be thought advisable.

In order to determine what changes can be made without such prejudice, it is important to know what the object of an indictment is as the present law declares it.

The Supreme Court of the United States has made the following declaration relating to the matter:[1]

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

"The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment."

The objects of the indictment, then, are these: (1) to enable the accused to prepare his defense, (2) to enable him in case he is again prosecuted for the same crime to plead as a defense his former conviction or acquittal, and (3) to give the court an opportunity to decide the case on the indictment without hearing the evidence, and the accused an opportunity to elect as to how he shall present his defense.

How many of these can be dispensed with without injuring the essential rights of the defendant?

[1] United States *v.* Cruikshank, 92 U. S. 452, 558, 559.

These statements quoted from the opinion of the Supreme Court indicate that an indictment is required for the benefit of the court. The theory of the common law, both on the civil and on the criminal side, was to try the case on the papers and not on the proof; to eliminate, so far as possible, questions of fact and the evidence to support them, leaving only questions of law to be decided by the judge.

To a great extent this theory has long been abandoned in civil cases, and there is no reason why it should not be in criminal cases. Of what importance is it to the court to know whether or not the facts *alleged* constitute an offense, when after the evidence has been presented it will have an opportunity to determine whether or not the facts proven constitute an offense?

So far as the present rules are for the benefit of the court as distinguished from the accused, they can be changed without injury to the substantial rights of the latter. But even as to him, these rules, so far as they relate not to the substance of his defense but to the particular manner in which he shall present it, are of no great moment.

What real difference can it make to him whether he present a defense which he has, by a plea of not guilty, or by a demurrer? If he is allowed to present the particular matter which he wishes to allege by a plea of not guilty, he is deprived of no substantial right by a law which abolishes motions to quash. If the right to demur is taken away it cannot be said that any constitutional privilege has been infringed. Nor can it be said that any right of the defendant is violated if the court is prohibited from deciding the case on the pleadings, and is required to decide it upon the facts.

It may be said that if a demurrer, or plea, or motion is sustained, the defendant is relieved of the expense of going to a trial on the merits, and a great deal of money may be thereby saved to him. This is true. But neither the Constitution nor any law declares that an innocent man shall be put to no expense in freeing himself from a groundless charge. One of a defendant's essential rights is that he shall not be convicted without a trial. But that such trial shall be carried on without expense to him is nowhere guaranteed.

There needs no argument to show that demurrers and motions to quash delay the progress of the case. That they can be abolished without impairing the essential rights of the defendant, clearly

appears. Whether they should or not is a question of expediency which will be discussed later.

Another object of the indictment is to enable the accused in case he is again prosecuted for the same crime, to plead as a defense his former conviction or acquittal.

This theory firmly imbedded in the common law has led to more absurd decisions than almost any other. It is chiefly responsible for the rule that the indictment must state all the ingredients of the offense. It is also responsible for those decisions which hold that if one is indicted for stealing a white horse belonging to Adams, and the jury find that the horse which he stole from Adams was a black one he must be released. The reason given is this: if he afterwards were indicted for stealing the black horse and pleaded that he had once been convicted therefor, he could not prove his plea, because on referring to the first indictment it would be seen that he was there charged with stealing a white horse. There never was any reason founded on experience for the existence of this rule. For if the man was convicted of stealing Adams' horse and served his sentence, no one would ever think or ever did think of prosecuting him again for stealing the same horse, no matter whether it was called a white horse or a black one in the first indictment. It is also safe to say that in cases where a defendant was acquitted on the ground that he never stole any horse belonging to Adams, whether white or black, not once in a thousand times would any one ever think of attempting to try him over again for the same offense, because the animal was wrongly described in the first indictment. And to cover even the thousandth case it would be very easy to provide that on the second trial the defendant should be permitted to introduce the evidence upon which he was acquitted, for the purpose of showing that the color of the horse had nothing to do with the result.

It therefore seems that this object of the indictment can be eliminated without prejudice to the essential rights of the defendant, and that all such rights can be preserved by providing simply that in case of a second indictment the entire proceedings of the first trial may be examined for the purpose of knowing just what was decided. With this elimination there would go one of the reasons for saying that the indictment must contain all the ingredients of the offense.

Of the three objects of the indictment there remains for consideration the first — to enable the accused to prepare his defense. It is confidently submitted that in any country where the object of its laws is the punishment of the guilty only, this should be the sole and exclusive object of an indictment, complaint, or criminal charge.

It is, however, thoroughly settled, at least in the federal courts, that the indictment must contain all the ingredients of the offense, that it must state all the facts which are necessary to constitute the crime.

The holdings of the Supreme Court to this effect did not result from that provision of the Sixth Amendment to the Constitution which requires that the defendant be informed of the nature and cause of the accusation against him, but rather from the doctrines of the common law and the rule adopted in England long before our Constitution was framed.

So true is this that the Supreme Court has said, in a case going up from the Philippines,[2] where the only provision was that the defendant should be informed of the nature and cause of the accusation, that it was not necessary, in order to satisfy that requirement, that the complaint should be good as against a demurrer. In that case the court observed:

"The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

It of course shocks the American or English lawyer to suggest that a man can be brought to trial upon an indictment or complaint which states the commission of no offense. But why should he not be? There are countries whose laws do not make the requirements which ours do. Judicial systems that have been adopted by highly civilized nations cannot be said to be wholly wrong, even if they do consider the rights of their subjects fully protected although the notice given to them of a criminal charge does not specify minutely and in great detail every possible ingredient of the offense.

It seems to be the fashion now for Americans to criticize harshly

[2] Paraiso *v.* United States, 207 U. S. 368, 372.

the Continental systems of criminal procedure. It might be suggested that this criticism comes with bad grace from a people whose administration of the criminal law is believed by some of their most prominent citizens to be a failure. Digressing a little, it may be said that much of it is based on misinformation as to what such systems really are. The American newspapers are wont to say that in the courts of Continental Europe a defendant is presumed guilty, and the doctrine that no conviction can be had unless guilt is proved beyond a reasonable doubt, was never heard of in any Latin country. To persons holding this belief a perusal of law 12, title 14, of the 3d *Partida* is commended. That law was promulgated in Spain more than six hundred years ago. It is as follows:

"A criminal suit which may be brought against any person either by way of accusation or of challenge, must be plainly proven by witnesses, by documents, or by the confession of the accused, and not by inference only. For it is a right thing that a suit which is instituted against the person of a man or against his reputation, should be investigated and proved by evidence clear as the light, in which there can be no manner of doubt. And therefore the wise men of old decided in this manner, and said that it was a more holy thing to acquit the guilty man against whom the judge was not able to decide by proof certain and manifest, than to give judgment against an innocent man, although they might find some suspicious circumstances against him."

Moreover, the system which requires a judicial officer (who neither prosecutes nor afterwards tries), as soon as he is notified of the commission of an offense to repair to the place and *at once* examine under oath all persons who appear to have knowledge of the affair, reducing their statements to writing, seems in theory to be superior to our plan of having such investigations conducted by administrative officers, or by professional or amateur detectives.

The Anglo-Saxon idea of an indictment came from the technical rules of pleading in civil actions adopted centuries ago. It lost sight entirely of that part of the procedure which related to the proof, and sacrificed everything for a scientific system of allegations.

All of the ingredients of the offense must be proved on the trial, but it is asserted with confidence that no reason can be given why they should all be set out in the notice to the defendant.

In what is said here it is not suggested that the grand jury be abolished. It can be retained. The written instrument which that

body returns into court should, however, not be required to set out all the ingredients of the offense, but need only inform the accused of the nature and cause of the accusation with sufficient definiteness so that he may prepare his defense.

That a defendant may be able to prepare his defense and still the indictment not be sufficient under the present rule, is shown in a variety of cases.

A jury found as a fact that Carli knew when he passed a counterfeit bill that it was counterfeit, yet after that finding he was released by the Supreme Court because the indictment did not allege that he knew that fact.[3] A complaint for adultery which did not allege that the defendant knew that the woman was married was defective under the Philippine law.[4] McDonald a railway engineer was released from a charge of manslaughter through criminal carelessness, because the indictment did not allege that he knew that a passenger train was due.[5] So when one is indicted for receiving stolen goods it must be alleged that he knew that they were stolen. It is apparent that if Carli in fact knew that the bill was counterfeit, if Mortiga knew that the woman was married, if McDonald knew that another train was then due, to be told of this fact by the grand jury in the indictment would in no way help any one of them in his preparation for trial. And if he did not know it he could not be convicted, no matter what the indictment alleged.

Laws requiring the complaint or indictment to state facts constituting an offense, and then allowing a demurrer to be presented based on the ground that no offense is alleged, should be repealed. And it should be declared that any complaint or indictment should be considered sufficient if it informed the defendant of the nature and cause of the accusation with sufficient definiteness so that he could prepare for trial.

The question recurs whether a demurrer or motion to quash should be allowed on the ground that the indictment does not comply with the new requirement. It is of course true that in case the complaint does not sufficiently notify the defendant of the nature and cause of the accusation, a great deal of expense will be saved

[3] United States *v.* Carli, 105 U. S. 611.
[4] Serra *v.* Mortiga, 204 U. S. 470.
[5] State *v.* McDonald, 105 Minn. 251.

both to the government and to the accused, and a great deal of trouble to witnesses and jury if that fact can be determined in advance of the trial. It is also true that in case the complaint is sufficient a great deal of time is wasted by the presentation of such dilatory pleadings or motions.

An examination of the decided cases would probably show that a great many more demurrers were overruled than were sustained. It is therefore believed that the administration of the criminal law would be improved if demurrers were entirely abolished.

But if this were found not practicable, and if the demurrer had to be retained, it should be interposed, not on the ground that the indictment did not state facts constituting an offense, but on the much more limited ground that it did not so notify the accused of the charge against him that he could prepare his defense. It should moreover point out the particular matters upon which the defendant wished to be further informed. If the court should be of the opinion that the defendant could not prepare for trial on the information furnished by the indictment, the law should allow an amendment to be at once made by the prosecuting officer without any action on the part of the grand jury. The law at present requires the grand jury to be satisfied from the evidence that all of the essential ingredients of the crime can probably be proved, and it also requires it to see that they are all contained in the indictment. The necessary result was that if an essential element of the crime was omitted from the indictment, the presumption arose that the grand jury had not found that particular fact proved. From this sprang the rule that an indictment could not be amended except by the grand jury itself.

But under the reformed procedure, while the grand jury will still be required to find all the facts proved which are necessary to constitute the offense, it will no longer be required to set them all out in the indictment. The objection to amendments by the prosecuting officer will thereupon disappear.

Can these changes be brought about without constitutional amendment?

The Act of Congress relating to the Philippines provides that no person shall be held to answer for a criminal offense without due process of law; that in all criminal proceedings the accused shall enjoy the right to demand the nature and cause of the accusation

against him, and that no law shall be enacted which shall deprive any person of life, liberty, or property, without due process of law.

It can be fairly deduced from the decision of the Supreme Court referred to,[6] that these provisions do not require that the complaint or indictment shall set forth all the facts which constitute the crime. In those jurisdictions, therefore, as in Minnesota, where similar provisions are in force, the desired changes can be made by an act of the legislature, and no amendment of the Constitution will be required.

The Fifth Amendment to the federal Constitution provides, however, that no one shall be held to answer for a felony except on an indictment by a grand jury. The word "indictment" must be construed to have the meaning given to it at the time the amendment was adopted.[7] It there meant an instrument which set forth all of the ingredients of the offense. It seems therefore that no change of the kind here sought could be introduced in the federal courts in cases of capital or otherwise infamous crimes, except by an amendment to the Constitution. In cases of misdemeanors, however, it can be done by an act of Congress alone.

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[6] Paraiso *v.* United States, 207 U. S. 368.
[7] Kepner *v.* United States, 195 U. S. 100, 125.